

Stone v Ingk Labs, LLC
2013 NY Slip Op 31320(U)
June 18, 2013
Sup Ct, NY County
Docket Number: 654049/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

JASON STONE and JEFFREY STONE,

Plaintiff,

INDEX NO. 654049/2012

MOTION DATE _____

- v -

MOTION SEQ. NO. _____

MOTION CAL. NO. 001, 2

**INGK LABS, LLC, PAYZ, INC., DAMION HANKEJH,
INDIVIDUALLY AND AS GENERAL PARTNER OF
INGK LABS, LLC AND PAYZ, INC., AND ANTHONY
CRAIG ALBERINO, INDIVIDUALLY AND AS
PRESIDENT/CEO OF INGK LABS, LLX AND
PAYZ INC.,**

Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2, 3, 4</u>
Answer — Affidavits — Exhibits _____	<u>5, 6</u>
Replying Affidavits _____	<u>7</u>

Plaintiffs Jason Stone and Jeffrey Stone (collectively, “Plaintiffs”) commenced this action with the filing of the Summons and Complaint dated November 19, 2012. Defendants Damion Hankejh (“Hankejh”) and Anthony Craig Alberino (“Alberino”) are alleged to be the owners of defendants Ingk Labs, LLC (“Ingk”) and Payz, Inc. (“Payz”).

Plaintiffs now move pursuant to CPLR §3215(a) for a default judgment against Defendants on their Complaint on the grounds that Defendants are in default and have not appeared in this action and have not responded to the Complaint within the time permitted by law after the initial service of the Summons and Complaint, nor within the time permitted by law after the additional service set forth in CPLR §3215.

Plaintiffs submit the attorney affirmation of Marjorie E. Berman and supporting affidavits of Jason Stone and Jeffrey Stone.

The Complaint alleges nine causes of action. The first cause of action alleges violation of Labor Law §191(1)(d) against Ingk and Payz for failure to pay Jason Stone wages, and seeks \$64,000 plus ordinary costs, expenses, reasonable attorneys' fees, liquidated damages, and prejudgment interest pursuant to New York Labor Law §198(1) and (1-a).

The second and third causes of action allege breach of contract claims against Ingk based on a failure to pay Jason Stone compensation and expenses pursuant to a January 1, 2012 and May 1, 2012 contract entered between Jason Stone and Ingk. The second cause of action seeks \$30,238.07 pursuant to the January 1, 2012 contract and the third seeks \$38,793.79 pursuant to the May 1, 2012 contract. Both contracts provide, "In any action or proceeding to enforce or interpret this Agreement, the prevailing party will be entitled to recover from any other party its costs and expenses (including reasonable attorneys' fees) incurred in connection with such action or proceeding and enforcing any judgment or order obtained."

The fourth cause of action asserts a breach of contact claim against Payz to repay Jeffrey Stone the principal sum of \$40,000, plus interest at 5%, pursuant to a Secured Loan Note Agreement dated March 6, 2012 entered between the parties, which provides for attorneys' fees upon Payz's failure to perform under the Note.

The fifth cause of action asserts fraud. The Complaint alleges that defendants Alberino and Hankejh made misrepresentations "that they had secured capital commitments . . .that could be called upon at any time," that "Hankejh would personally fund Ingk to pay Stone's wages in the event that Ingk did not have sufficient funds to do so," "that Hankejh had the financial where-with-all and commitment to fully fund Ingk and Payz until the capital commitments were called in," and that they had secured capital commitments for Payz and Ingk. The Complaint alleges that each of these statements were false when made and that defendants knew they were false, and were intended to induce Jason Stone to become employed by defendants, to sign the contracts, and to sign the Convertible Promissory Note dated May 1, 2012 in lieu of payments due to Jason Stone under the January 1, 2012 contract.

The sixth cause of action seeks a declaratory judgment that the Convertible Promissory Note signed by Jason Stone dated May 1, 2012 in lieu of payments due to him under the January 1, 2012 agreement is void based on the material

misrepresentations made by Hankejh and Alberino that he relied upon in agreeing to sign the Note.

The eighth and ninth causes of action seek to pierce the corporate veils of Ingk and Payz and hold Alberino and Hankejk personally liable for the corporate defendants in the event the companies are insolvent.

Defendants Ingk and Payz were served via the New York Secretary of State with the Summons and Complaint on December 13, 2012. Copies of the affidavits of service from the Secretary of State are annexed to Berman's certification.

Defendant Alberino was served on January 2, 2013 by leaving the Summons and Complaint and Notice of Commencement of Action Subject to Mandatory Filing with a person of suitable age and discretion at Alberino's residence and thereafter, on January 10, 2013, by mailing to Alberino's residence a copy of the Summons and Complaint.

Defendant Hankejh was served on January 4, 2013 was served by "Nail and Mail" Substituted service by affixing the Summons and Complaint and Notice of Commencement of Action Subject to Mandatory Filing to the door of Mr. Hankejh's residence and thereafter, on January 7, 2013, by mailing a copy of the Summons and Complaint. The affidavit states that previous attempts to serve had been made on December 10, 2010 at 6:28 pm and on January 2, 2013 at 12:08 pm. Copies of the Affidavits of Service on Alberino and Hankejh are annexed as exhibits to Berman's moving affirmation.

Pursuant to CPLR §3215(g), on March 5, 2013, Defendants were served with an additional copy of the Summons and Complaint by first class mail.

Defendants Alberino and Hankejh submit affidavits in opposition to Plaintiffs' motion on behalf of themselves individually and on behalf of Ingk and Payz. In their opposition, Alberino and Hakejh challenge the service that was purportedly rendered and state that they did not become aware of the Plaintiffs' action until March 13, 2013 via United States Postal Service delivery of a copy of the Summons, and thereafter tried to settle the matter. An answer was subsequently e-filed on April 15, 2013, an amended answer on April 22, 2013, and another amended answer on April 25, 2013.

on behalf of Hänkejh, Alberino, Inkg, and Payz pro se, which does not assert a defense based on service.

Plaintiffs moved by Notice of Motion dated May 16, 2013 (Mot. Seq #2) to strike Defendants' Answer, Amended Answer, and Demand for Documents on the basis that Defendants had no authority to file the answer after full submission of Plaintiffs' motion for default judgment.

As defendants Alberino and Hakejk have now answered by way of their Amended Answer e-filed on April 25, 2013 and in light of New York courts' preference that controversies to be resolved on the merits, Plaintiffs' motion for default judgment against them is denied and issue is joined.

However, as the corporate defendants may not appear without an attorney as provided in CPLR § 321, the corporate defendants, to date, have failed to appear.

“While a default judgment constitutes an admission of the factual allegations of the complaint and the reasonable inferences which may be made therefrom, plaintiff must present some proof of liability so that the reviewing court can determine that the ‘prima facie validity’ of the uncontested cause of action has been established because the granting of a default judgment does not become a ‘mandatory ministerial duty’ upon a defendant's default.” *See generally Gagen v. Kipany Prods.*, 289 A.D. 2d 844, 845-46 [2001].

Here, while Jason Stone seeks a default judgment on his cause of action for violation of Labor Law § 191(1)(d) against defendants Inkg and Payz for failure to pay him wages, in light of the terms of the “Consulting Agreements” that Jason Stone entered with Inkg and the compensation he alleges he is due, he has not established prima facie validity that he was an employee under New York Labor Law §190(2) to warrant a default judgment for relief he seeks under Labor Law §191(1)(d). *See Akgul v. Prime Time Transp., Inc.*, 293 A.D. 2d 631, 633 [2d Dept. 2002]. Jason Stone has established factual allegations to warrant default judgment on his claim for breach of those agreements and fraud, entitling him to damages and a declaratory judgment that the May 1, 2012 Convertible Promissory Note he entered with Payz for the amount he had earned under the first agreement is void.

Additionally, based on his affidavit, Jeffrey Stone has established factual allegations to warrant default judgment on his claim against Payz for breach of the Secured Loan Note Agreement dated March 6, 2012.

Wherefore, it is hereby

ORDERED that Plaintiffs' motion for default judgment is granted only as to defendants Ingk Labs, LLC, and Payz, Inc.; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff Jason Stone and against defendant Ingk Labs, Inc., in the amount of \$68,977.96, together with interest as prayed for allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff Jeffrey Stone and against defendant Payz, Inc., in the amount of \$40,000, together with interest as prayed for allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED and ADJUDGED that the Convertible Promissory Note dated May 1, 2012 entered between Jason Stone and Payz, Inc. is void; and it is further

ORDERED that the amount of reasonable attorneys' fees and costs owed by Ingk, Inc. to Jason Stone pursuant to the terms of Jason Stone's January 1, 2012 and May 1, 2012 Consulting Agreements is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that the amount of reasonable attorneys' fees and costs owed by Payz, Inc. to Jeffrey Stone pursuant to the Secured Loan Agreement dated March 6, 2012 is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the

Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendants, of the date of the hearing; and it is further

ORDERED that Plaintiffs' motion to strike defendants Damion Hankejh and Anthony Craig Alberino's Answer, Amended Answer, and Document Demand is denied; and it is further

ORDERED that Plaintiffs' action against Damion Hankeh and Anthony Craig Alberino is severed and shall proceed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 6/18/13


HON. EILEEN A. RAKOWER
J.S.C.

Check one: **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**

Check if appropriate: **DO NOT POST REFERENCE**